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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

RICOH COMPANY, LTD., ) Case No. CV-03-4669-MJJ (EMC)  
Plaintiff, )  
v. ) **RICOH'S REPLY IN SUPPORT OF**  
AEROFLEX ET AL., ) **ITS MOTION FOR SANCTIONS**  
Defendants. )  
Date: April 19, 2006  
Time: 10:30 a.m.  
Courtroom: C

**CASE NO. CV-03-4669-MJJ (EMC)**  
**RICOH'S REPLY IN SUPPORT OF ITS MOTION FOR SANCTIONS**

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1       The stark question presented by Ricoh's motion is whether the Defendants should be  
 2 permitted to get away with the their failure to comply with the Court's order to serve comprehensive  
 3 declarations in July and August 2005, which (assuming they were accurate) would establish the  
 4 boundaries for discovery and trial. There is no dispute over the terms of the Order: Defendants  
 5 agree with Ricoh that they were required to submit accurate and complete declarations under the  
 6 penalty of perjury. (Opp. at 6, n.4: "No one disputes that Judge Jenkins directed the declarations to  
 7 be complete and signed under penalty of perjury"). Defendants do not deny Ricoh's showing, at  
 8 page 6 of its motion (at p. 6) that Judge Jenkins specifically ordered Defendants that if the  
 9 declarations were inaccurate, sanctions would follow. There is no dispute over what the Court said  
 10 those declarations should contain: a complete listing of the technical libraries and all ASICs  
 11 synthesized using Design Complier. On August 30, 2005, Defendants admitted that "[t]he Product  
 12 Declarations provided on August 15 and 16 included information about the target technology  
 13 libraries or library families used for the logic synthesis of the products listed." (De Mory Dec., Ex.  
 14 4, at 7.) There is no dispute that Defendants' declarations in July and August were neither complete  
 15 nor comprehensive; after Ricoh raised questions about the accuracy of the declarations, Defendants  
 16 repeatedly had to supplement them. There is no dispute that Defendants originally understated the  
 17 number of accused ASICs by a factor of four or more. Even today there are still many more chips  
 18 that have never been disclosed. These facts are established by Ricoh's motion, they are not disputed  
 19 and in some instances they are even expressly admitted in Defendants' response.

20       The only unresolved issues are as follows:

21       **Have Defendants failed to disclose any ASICs?** The first issue is whether Defendants  
 22 have failed to declare a significant number of ASICs that should have been disclosed more than six  
 23 months ago. Defendants' two-fold response is deeply disturbing. They first assert there is no  
 24 obligation to disclose ASICs that they claim are not commercial products, even though their  
 25 witnesses could not define what a "commercial product" is, and even though the Defendants admit  
 26 receiving revenue from the sales of so called "non-commercial" ASICs. Second, and even more  
 27 disturbing, AMI Semiconductor has refused to disclose any ASICs that were synthesized, offered for  
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1 sale or sold by one or more still-unidentified wholly-owned subsidiaries under AMI's complete  
2 direction and control. This rationalization ignores the express directions of the Court, and is flatly  
3 inconsistent with a letter sent immediately after the CMC expecting the declarations to include  
4 information "by each such defendant and others acting on their behalf or to whom they subcontract  
5 out part of the logic synthesis process)." (Brothers 3/21/06 Dec., Ex. 2, Hoffman 7/15/05 letter to  
6 Corbin.) Defendants argument ignores the fact that AMI itself acquired the assets at issue, directed  
7 the infringing activity, and received the revenue from the sale of the ASICs created by the infringing  
8 process. AMI's argument is also inconsistent with Defendants' prior insistence that subsidiaries  
9 need not be separately sued, and mocks the instructions of Judge Jenkins that the boundaries of  
10 discovery and trial would be defined by the Defendants' honest and complete disclosure of all  
11 relevant ASICs.

12 Defendants acknowledge that they have not provided discovery on the missing ASICs.  
13 For example, the remarkable March 14, 2006, declaration of Mr. Smith of AMI refers to ASICs  
14 designed using Design Compiler, and for which it has received revenue during the relevant time  
15 period (1997 to the present), yet to this day AMI has *never* identified those ASICs or produced the  
16 inputs, specifications, code, product packages, related emails, other design documents or any  
17 financial information. AMI claims that the fact that those ASICs may have been synthesized by  
18 AMI's subsidiaries as opposed to the ultimate parent should shield it from any sanctions. But this  
19 weak excuse ignores the fact that: AMI acquired the assets in question; AMI decided how they  
20 should be organized; AMI ignored any corporate formalities by creating business units that spanned  
21 multiple continents and subsidiaries; AMI directed the actions of its subsidiaries; AMI sold and  
22 offered for sale the products that are accused of infringement; and AMI received the benefits of that  
23 infringement. Defendants do not dispute that Mr. Smith wanted to disclose these ASICs in an earlier  
24 version of his declaration, but was forbidden by the Synopsys attorneys from making the full and  
25 complete disclosure under penalty of perjury as ordered by Judge Jenkins. Likewise, there is no  
26 dispute that Aeroflex has never submitted a declaration disclosing its "JW02" ASIC, even though  
27 Defendants' opposition brief essentially concedes that it should have been disclosed.

1           **What is the appropriate sanction?** The second issue that the Court must decide is the  
 2 appropriate sanction for Defendants' failure to comply with Judge Jenkins' order. Defendants do no  
 3 dispute the authority of this Court to regulate its proceedings, and punish parties that have failed to  
 4 comply with Court orders. Defendants' non-compliance with Judge Jenkins' instructions have had  
 5 an enormous consequence upon the pretrial preparations. Defendants were obligated to fully  
 6 disclose all of the ASICs in August, promptly produce all of the relevant documents, and engage in  
 7 timely discovery in order to enable this case to be timely prepared for trial. They have failed to do  
 8 so. One of three things can occur as a result, two of which reward Defendants for their non-  
 9 compliance: (1) the undisclosed ASICs are excluded from the case; or (2) discovery is extended for  
 10 months and trial is again delayed; or (3) the Court grants Ricoh its requested relief for updated  
 11 declarations from a senior corporate officer from each Defendant, evidentiary preclusions with  
 12 respect to those undisclosed ASICs, and immediate financial discovery.

13           Defendants' conduct has blocked Ricoh from obtaining the required discovery on these  
 14 missing chips. All parties agree that the July and August 2005 declarations – assuming they were  
 15 accurate – were to form the foundation upon which the remaining discovery was to be based, and  
 16 define the scope of the trial. As a result of Defendants' failure to comply with this Court's  
 17 instructions, Defendants have not produced the relevant documents for those missing chips. Ricoh  
 18 has no discovery of the process used to design the missing chips, or the sales, or anything else,  
 19 because Defendants have produced nothing relating to the ASICs that they have not disclosed.

20           **I. THERE IS NO MATERIAL FACTUAL DISPUTE REGARDING MOST ISSUES**

21           **No dispute re Court Order.** The parties agree that the Court instructions were to set  
 22 forth *all* of the Defendants' commercial ASICs designed, manufactured, offered for sale or sold  
 23 using the identified Synopsys products, to identify all of the related technical libraries. The parties  
 24 also agree that the Court warned counsel for the Defendants that those declarations were to be sworn  
 25 under the penalty of perjury, and that if the declarations were incomplete or misleading, sanctions  
 26 would follow.

1           **No dispute re schedule.** Under the current schedule, Ricoh is to serve its final  
 2 infringement contentions on March 24, 2006; Defendants are to serve their final invalidity  
 3 contentions on April 24, 2006; fact discovery ends on May 30, 2006. Trial is set for November 27,  
 4 2006. The parties agree that they cannot maintain the current schedule and still provide complete  
 5 discovery regarding the ASICs that Defendants have failed to disclose, but Defendants' proposal to  
 6 further postpone the trial would essentially reward Defendants for their own bad acts. Trial has  
 7 already been postponed for more than two years; Ricoh will not agree to any more extensions.

8           **There is no dispute that Defendants repeatedly have supplemented their**  
 9 **declarations.** As set forth in the exhibits to Ricoh's motion, Defendants repeatedly have  
 10 supplemented their declarations. In fact, after Ricoh filed its motion, Defendant Aeroflex served a  
 11 further supplementation (Brothers 3/21/06 Dec., Ex. 1), but still did not include a chip (JW02) that it  
 12 essentially has conceded should have been listed. Brothers 3/21/06 Dec., ¶ 2.

13           **Three different ASIC declarations from AMI Semiconductor:** Defendants admit that  
 14 they have served three versions of the ASIC product declarations from AMI: the first on August 15,  
 15 2005; the second on October 12, 2005; and the third on January 10, 2006. (Brothers 2/21/06 Dec.,  
 16 Ex. 2, 3 and 4.)

17           **The AMI declaration is not complete.** According to the March 14, 2006 declaration of  
 18 Mr. Smith, there are still other ASICs sold by AMI in the U.S. that were synthesized using Design  
 19 Compiler since 1997 that have never been disclosed in any declaration. Defendants do not dispute  
 20 that, during his deposition, Mr. Smith stated that "the circuits from several of the business units were  
 21 not included at the direction of counsel," even though he said that those business units each perform  
 22 ASIC logic synthesis using Design Compiler. (Brothers 2/21/06 Dec., Ex. 10, at 155-58.)

23           Judge Jenkins ordered that the ASIC product declarations to disclose the ASICs for  
 24 which Design Compiler was used to perform logic synthesis and which were synthesized and/or sold  
 25 in the U.S. by a Defendant. Judge Jenkins made clear that such logic synthesis includes acts  
 26 performed by the Defendants, or on their behalf by their subsidiaries or contractors. Thus, on July  
 27 15, 2005 (shortly after the CMC with Judge Jenkins), Gary Hoffman emailed Teresa Corbin and  
 28

1 stated Ricoh's understanding of the information that the Defendants were to provide in their  
 2 declarations, including:

3       Each of the ASIC Defendants will provide declarations/stipulations to Ricoh by 11 AM  
 4 California time on Thursday, July 21, 2005 indicating each type of input that has been used  
 5 by each such Defendant (*and others acting on their behalf or to whom they subcontract out*  
 6 *part of the logic synthesis process*) and the best approximation of the percentage of sales  
 7 volume related to each type of input.

8 Brothers 3/21/06 Dec., Ex. 2, emphasis added.

9       Logic synthesis acts performed on behalf of, or under subcontract to, the Defendants  
 10 (including acts performed by AMI business units) are highly relevant to the scope of infringing  
 11 products and the corresponding damages to which Ricoh is entitled. The Court made clear that the  
 12 declarations were to be drafted consistent with this fundamental understanding. Defendants now  
 13 admit that AMI declaration is not consistent with these instructions, and thus is incomplete. Ricoh's  
 14 proposed remedy of a full and final declaration would resolve this issue.

**15           AMI's failure to disclose any ASICs from its 2002, 2004 and 2005 acquisitions.**

16 Defendants admit that, hours before Mr. Smith's deposition, Defendants' counsel disclosed for the  
 17 first time that it had never disclosed any ASICs from its Flextronics acquisition. Remarkably, in its  
 18 March 14 filing, AMI disclosed that it had two other acquisitions in 2002 and 2004 which included  
 19 ASICs sold in the U.S. that were synthesized using Design Compiler since 1997, and AMI has *never*  
 20 identified those ASICs. Brothers 3/21/06 Dec., ¶ 3. An updated declaration is required.

21       **AMI's Misleading Library Declarations.** AMI does not deny that there have been  
 22 multiple versions of its library declarations, dated July 21, 2005 and November 3, 2005 (with the  
 23 latter not served until January 17, 2006) (Brothers 2/21/06 Dec., Ex. 6 & 7.)<sup>1</sup> Likewise, Defendants  
 24 do not dispute that Mr. Smith testified that, at the instruction of counsel, he did not inquire into  
 25 which libraries were used for the BIST products, and was forbidden from explaining why changes

26 

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 27 <sup>1</sup> Defendants make no excuse for their failure to timely serve these declarations. The fact that Ms. De  
 28 Mory laughingly said she was too busy to serve the declarations for months is no justification for  
 withholding the declarations that were to define the scope of this case.

1 were made in the declarations. (Brothers 2/21/06 Dec., Ex. 5, Smith Tr. at 188, 197-98.) All of  
 2 these libraries should be disclosed after a complete investigation.

3 **Three version of Aeroflex product declarations.** Defendants admit that they have  
 4 served three different versions of the declarations from Aeroflex: the first on August 12, 2005; the  
 5 second on October 13, 2005; and the third on February 28, 2006. Brothers 2/21/06 Dec., Ex. 15, 17;  
 6 Brothers 3/21/06 Dec., Ex. 1.

7 **Defendants' inability to define commercial products.** Defendants concede that, in the  
 8 October 12, 2005 Aeroflex product declaration, it removed ASICs previously identified in the  
 9 August 12, 2005, declaration because the products allegedly were "not commercial product[s]" or  
 10 "did not undergo synthesis," even though the prior declaration said that these ASICs were  
 11 "commercial products" and did undergo synthesis. (Compare Brothers 2/21/06 Dec., Ex. 10 &12.)  
 12 The declarant, Brandon Coco, testified in his deposition that he could not explain why those  
 13 products had been removed, and did not know what was meant by "not commercial product," even  
 14 though he had signed the declaration under penalty of perjury. (Brothers 2/21/06 Dec., Ex. 14, Coco  
 15 Tr. at 95-97.) This is not an inconsequential issue, as Defendants claim in their opposition brief at  
 16 pages 11-13, but is further evidence of their failure to comply with Judge Jenkins' instructions.

17 There is no dispute that Aeroflex has received revenue associated with a significant  
 18 number of ASICs that were not listed on the declaration or that supposedly were not "commercial  
 19 products." In its moving papers, Ricoh cited (at pp. 9-12) testimony from all of the Aeroflex  
 20 designees proving this point, and Aeroflex does not deny it. Today, Ricoh still does not know the  
 21 basis for Aeroflex's decision to classify some ASICs for which they have received revenue as "non-  
 22 commercial products." Ricoh's proposed remedy would resolve this.

23 **ASIC vs. ASSP.** Defendants do not dispute that the Court has defined an ASIC as "an  
 24 integrated circuit chip designed to perform a specific function." (D.I. 296, Claim Construction Order  
 25 at 2.) Nor do they dispute that Aeroflex's corporate designees ignored this definition and instead  
 26 used a much narrower definition of an ASIC as an application specific integrated circuit designed for  
 27 a *specific* customer. (Brothers 2/21/06 Dec., Ex. 15, Kerwin Tr. at 19-21, 177-178; Ex. 16, Milliken  
 28

1 Tr. at 27-29.) As a result, Aeroflex did not conduct an adequate investigation into its ASIC standard  
 2 products, or ASSPs. Ricoh has been unable to confirm that all of the ASICs, as defined by this  
 3 Court, listed on Aeroflex's Short Form that were synthesized using Design Compiler have been  
 4 included on the Aeroflex declarations. For example, Mr. Milliken could not identify whether Design  
 5 Compiler was used to synthesize certain ASICs on the Short Form. (Brothers 2/21/06 Dec., Ex. 16,  
 6 Milliken Tr. at 286-87.) It is unclear from the witnesses' testimony whether an adequate  
 7 investigation of the products made by the Plainview facility was ever conducted. (Brothers 2/21/06  
 8 Dec., Ex. 16, Milliken Tr. at 31-32.) To this day, Ricoh does not know which ASSPs should have  
 9 been included on the Aeroflex declarations. This is why a comprehensive investigation and new  
 10 declaration is an appropriate remedy.

11 **Aeroflex's failure to list the JW02 product.** Defendants concede (at p. 10) that the  
 12 JW02 chip should have been listed. But even though Aeroflex submitted a second declaration in  
 13 October 2005, and a third after Ricoh filed its motion for sanctions, Aeroflex still inexplicably failed  
 14 to list the JW02 chip! Even now, Aeroflex has never provided a declaration listing the JW02 chip,  
 15 even though it concedes that it should have. Ricoh's proposed remedy would resolve this.

16 **The multiple Matrox declarations suggest similar problems.** Multiple Matrox product  
 17 declarations were served on August 16, 2005 and October 13, 2005. (Brothers 2/21/06 Dec., Ex. 18,  
 18 19, 20, 21, 22, 23.)<sup>2</sup> Ricoh believes that, based upon the problems identified with the Aeroflex and  
 19 AMI Semiconductor declarations, and given the late stage of discovery, it would be prudent to have  
 20 the Matrox entities submit full and final declarations.

21 **II. CORRECTION OF DEFENDANTS' OTHER MISSTATEMENTS**

22 Defendants' opposition brief contains an unfortunate number of misstatements that, while  
 23 not central to the core issues of the failure to disclose, or the appropriate sanction to be imposed,  
 24 nonetheless should be pointed out to the Court.

25  
 26 <sup>2</sup> Defendants do not dispute that another Matrox library declaration was executed on November 4, 2005,  
 27 but was not served until February 14, 2006. (Brothers 2/21/06 Dec., Ex. 28.)

1           **Ricoh's focus is on proving infringement.** Defendants attempt to avoid responsibility  
 2 by asserting that Ricoh is more interested in pursuing discovery disputes than proving the merits of  
 3 its claims. This assertion is belied by Ricoh's intense focus on the merits and its preparation for  
 4 trial. If Defendants would have identified the relevant ASICs, timely produced the requested  
 5 evidence, and properly prepared its Rule 30(b)(6) witnesses, then this motion would not be  
 6 necessary. Ricoh's proposed remedy is focused upon trying the case as scheduled.

7           **The Fink email.** On July 15, 2005, Ms. Fink indicated that "home brew" libraries  
 8 created using DesignWare Developer or libraries purchased in Synopsys .db format are not at issue  
 9 in the present case. (Brothers 2/21/06 Dec., Ex. 1.) Defendants do not seriously dispute that this  
 10 statement is wrong. They instead claim that this statement was based upon a misunderstanding of  
 11 the Court's instructions at the CMC, but this appears to be little more than a plea for mercy. The  
 12 evidence suggests that Ms. Fink was implementing a plan to not disclose information sought by  
 13 Ricoh and Ordered by the Court. For example, the CMC statement clearly identifies Ricoh's  
 14 position that *all* technical libraries should be identified and produced. (De Mory Dec., Ex. 2, at 28:  
 15 CMC statement identifying all of the libraries, including those excluded by Ms. Fink.) Thus, for at  
 16 least a month *before* the July 2005 case management conference, Defendants knew that Ricoh was  
 17 seeking all such libraries, and not (as Ms. Fink wrote) excluding "home brew" libraries or libraries  
 18 obtained from Synopsys.

19           During the Case Management Conference, Judge Jenkins wanted to know where the  
 20 parties' principle disputes lay regarding the production of the source code and libraries, including  
 21 design libraries and target technology libraries. Ricoh made clear that it was seeking discovery of  
 22 *all* design libraries. Ricoh pointed out to the Court how Synopsys' documentation specifically  
 23 identified design libraries in which users could store synthesis components created using  
 24 DesignWare Developer. Thus, Defendants were on explicit notice both before and during the CMC  
 25 that Ricoh was seeking discovery on all libraries. Ms. Fink's email is to the contrary.

26           Consistent with Ricoh's statements during the CMC, on July 18, 2005, Ricoh confirmed  
 27 to Defendants that it was seeking:

1 Design libraries (see, e.g., *DesignWare Building Block IP User Guide* (RCL009357-9448) at  
 2 Ch 1 pp. 17-18, 20); *DesignWare Developer's Guide* (RCL009449-9622) at 23-24, 146) . . .  
 3 [and] [a]ny libraries used by or made by (or behalf of) an ASIC Defendant as a replacement  
 4 or substitute for any of the above libraries (see, e.g., the comments of the ASIC Defendants  
 5 in the CMC at Page 18, lines 17-19)

6 (Brothers 3/21/06 Dec., Ex. 3, at 2). Contrary to Ms. Fink's email, the CMC statement and the  
 7 discussions at the CMC and Ricoh's July 18 letter make clear that Ricoh was seeking libraries  
 8 Defendants may have created using DesignWare Developer. The argument that Defendants' counsel  
 9 did not understand this is belied by the record. The most telling fact is that, despite this record,  
 10 Defendants' counsel was directing her clients *away* from collecting relevant library information.  
 11 This, combined with the hopelessly incomplete declarations that were served in July and August, is  
 12 solid evidence of willful concealment.

13 **Ricoh quickly suspected the declarations were incomplete.** Defendants wrongfully  
 14 claim (at p. 7) that Ricoh "has never taken issue with the stated scope of the Declarations." To the  
 15 contrary, as soon as Ricoh received the first set of library declarations in July 2005, Ricoh suspected  
 16 the Defendants had not made a sufficient disclosure, because the library declarations did not match  
 17 the ASICs that the Defendants were offering for sale. For example, Aeroflex's first list of libraries  
 18 and its publicly available list of ASICs simply did not match – it was selling ASICs of a specific  
 19 micron width, but it did not disclose the libraries of the micron size used to create those ASICs, and  
 20 vice-versa.

21 Ricoh's counsel repeatedly asked Defendants' counsel if their declarations were accurate.  
 22 In a letter dated August 17, 2005 Ricoh identified several exemplary deficiencies in the Defendants'  
 23 declarations. At least one of the deficiencies included in the letter related to the Aeroflex  
 24 declarations stating that "a comparison of Aeroflex Colorado's list of products to [the] Declaration  
 25 of Brandon Coco In Support of Defendants' Stipulation to Design Libraries reveals difference  
 26 between the technology libraries." (Brothers 3/21/06 Dec., Ex.4, Hoffman Ltr. at 2.) On August 16,  
 27 2005, this Court instructed the parties to further meet and confer on this and other issues. (D.I. 319.)  
 28 At a meet and confer on August 22, 2005, Defendants' counsel explicitly (but falsely) assured

1 Ricoh's counsel that Defendants had conducted an exhaustive review of their client's products, and  
 2 that the July and August declarations were accurate. Based upon that assurance, the parties  
 3 submitted a joint letter to the Court on August 30, 2005, in which Ricoh stated its reliance upon this  
 4 representation, which Ricoh now knows to have been false:

5 The libraries that are relevant to this suit are target technology, synthetic, symbol, link,  
 6 design, and GTECH libraries for the ASICs products designed using Design Compiler.  
 7 Pursuant to Judge Jenkins' Order at the July 13, CMC, on July 21 and August 15 and 16, the  
 8 ASIC Defendants submitted declarations that, *according to their counsel*, include a full and  
 9 complete list of all such ASICs, and libraries, from 1997 through the present.

10 (De Mory 3/14/06 Dec., Ex. 4, at 3, emphasis added.) Defendants misquote this statement (at p. 7)  
 11 to claim that "Ricoh affirmed that the scope of the Declarations was proper." In fact, this statement  
 12 reflects the fact that Ricoh had questions about the scope of the declarations, and that Defendants  
 13 expressly assured Ricoh that the declarations were accurate. As borne out by subsequent events –  
 14 the multiple replacement declarations, the increase of accused products from 60 to more than 200,  
 15 the acknowledgement that there are many more ASICs that never have been disclosed – these initial  
 16 declarations were more than just incomplete. They were wrong, and defendants knew it.

17 **The late and incomplete disclosure of the missing AMI ASICs.** Defendants also  
 18 temporally scramble the events surrounding Ricoh's discovery that AMI Semiconductor had failed  
 19 to disclose the additional ASICs and libraries. Less than 36 hours before the February 9, 2006,  
 20 deposition of the AMI Semiconductor declarant, Defendants' counsel acknowledged that none of the  
 21 AMI declarations disclosed any of the Flextronics chips. (De Mory Dec., Ex. 1.) Contrary to the  
 22 characterization in Defendants opposition papers (at pp. 15-16), that letter did not schedule or  
 23 request a meet and confer. Instead, Ricoh's counsel sought to meet and confer following the Smith  
 24 deposition, where Ricoh requested new declarations and a complete production of relevant  
 25 documents. Defendants assert that the meet and confer was "exclusively" limited to three topics, but  
 26 the cited support for this statement (De Mory Dec., Ex. 9) makes no such mention of this, and is  
 27 flatly contradicted by the extensive agenda for those meet and confer sessions. (Brothers 3/21/06  
 28 Dec., ¶ 4, Ex. 7, 8.) In fact there were at least two wide-ranging meet and confer sessions between

1 counsel in which this topic was addressed. (Brothers 3/21/06 Dec., ¶ 4.) Ricoh did all it could to  
 2 address the issue, only to be repeatedly rebuffed by Defendants.

3 Late on February 21, 2005, the same day that Ricoh filed the sanctions motion,  
 4 Defendants' counsel sent a letter proposing a four month continuation of the discovery schedule,  
 5 other pretrial dates, and trial in order to investigate and produce documents relating to the missing  
 6 AMI Semiconductor documents. (De Mory Dec., Ex. 9.) The February 21 letter proposing a four  
 7 month delay confirmed that Defendants' strategy was to continue to interminably delay this case.<sup>3</sup>  
 8 Contrary to Defendants' assertion (at p. 16) that this letter was ignored, it was discussed by counsel  
 9 the next day, and was formally rejected by Ricoh on February 28, 2006: "Ricoh does not agree with  
 10 any aspect of your proposal that would defer the discovery deadlines and other pretrial or trial  
 11 dates." (Brothers 3/21/06 Dec., Ex. 5, Brothers Ltr. to De Mory.)

12 **III. ONLY TWO ISSUES MUST BE RESOLVED BY THIS COURT**

13 **A. Whether Defendants Have Wrongfully Failed To Disclose ASICs**

14 Defendants offer two explanations for not disclosing all of the ASICs. First, they claim  
 15 that they were under no obligation to disclose ASICs that they claim were not commercial products,  
 16 even though they earned revenue from them. Second, they claim that they had no obligation to  
 17 disclose any ASICs that were synthesized by a wholly-owned subsidiary under their complete  
 18 direction and control. Both arguments are fundamentally inconsistent with the Court's instructions.

19 **1. Defendants' Inability to Explain Why ASICs That They Have Sold  
 20 Are Not "Commercial Products"**

21 At the CMC, Ricoh made clear that it had no interest in proving infringement for ASICs  
 22 for which there were no revenue. Ricoh seeks a reasonable royalty on the products created as a

23  
 24 <sup>3</sup> Defendants have moved to delay Ricoh's infringement action on four separate occasions: (1) in  
 25 Delaware in June 2003, where the motion was denied; (2) in this Court in September 2003, where the  
 26 motion was denied; (3) in the June 2005 CMC statement (De Mory Dec., Ex. 2, at 37) ("Synopsys and  
 27 the Customer Defendants seek a stay of the action against the Customer Defendants"), where the motion  
 was denied; and (4) on February 28, 2006 (D.I. 370), which Ricoh has opposed (D.I. 382) and, unless  
 the Court issues an order beforehand, is set for argument on April 4.

1 result of the Defendants' use of the process disclosed in claims 13-17 of the '432 patent.

2 As Ricoh explained in its motion (at pp. 9-12), however, each of the Aeroflex witnesses  
 3 testified that Aeroflex had received revenue associated with at least one ASIC that was not included  
 4 on the declaration or was removed from the declaration because it was supposedly not a  
 5 "commercial product." (Brothers 2/21/06 Dec., Ex. 14, Coco Tr. at 95-97; Ex.15, Kerwin Tr. at 104-  
 6 110, 129-130; Ex. 16, Milliken Tr. at 131-132.) These witnesses were unable to provide the  
 7 definition of "commercial product" as used to determine the products included in the product  
 8 declarations. Mr. Coco, who signed the declarations, testified that he did not know what was meant  
 9 by "not commercial product." (Brothers 2/21/06 Dec., Ex. 14, Coco Tr. at 95-97.) Mr. Milliken  
 10 could not identify why specific ASIC products were removed from the declarations as "not  
 11 commercial product" while others remained. (Brothers 2/21/06 Dec., Ex. 16, Milliken Tr. at 51-60,  
 12 70-79.) Mr. Milliken believed that a substantial number of the products identified on both  
 13 paragraphs 3 and 4 of the Supplemental Representative Product declaration fell into the category of  
 14 being products sold for eventual use by the military. *Id.* He was ultimately unable to determine why  
 15 select products were identified as "not commercial product" and removed while others remained on  
 16 the list of "commercial products." *Id.*

17 Thus, Aeroflex's witnesses could not define what a "commercial product" was, nor could  
 18 they explain why Aeroflex received revenue for ASICs that it claimed were not commercial  
 19 products. Ricoh's questions on this subject were met with vigorous scope objections – more than  
 20 300 in the one-day Milliken deposition alone. To this day, Ricoh has been unable to find out the  
 21 standards used to define a "commercial product." As a remedy, defendants should be ordered to  
 22 amend their declarations and disclose all ASICs synthesized using Design Complier and for which  
 23 they received any revenue between 1997 and the present.

24 **2. AMI's Refusal To Identify And Disclose ASICs That Were Hidden In  
 25 Subsidiaries**

26 For the first time, in Defendant's opposition, they have disclosed that, between 2002 and  
 27 2005, AMI Semiconductor made at least three different asset acquisitions that included ASICs that

1 were synthesized using Design Complier. AMI has not produced the relevant documents regarding  
 2 those transactions, contrary to the Defendants' implication (at p. 15). Indeed, prior to the submission  
 3 of the Smith declaration on March 14, AMI had never disclosed that the 2002 or 2004 acquisitions of  
 4 assets from STMicroelectronics NV and Dspfactory included relevant ASICs. (Brothers 3/21/06  
 5 Dec., ¶ 5.)

6 Defendants admit at page 14 of its brief that AMI has numerous wholly owned  
 7 subsidiaries that have engaged in synthesis of ASICs that fall squarely within the bounds of the  
 8 Court's CMC order. AMI does not deny that it has sold these ASICs, and received the revenue from  
 9 these products made by the infringing process. Nor do Defendants deny that Judge Jenkins ordered  
 10 them to disclose these ASICs. Nor do Defendants deny that on July 15, 2005 – well before the first  
 11 declaration was served – Ricoh put Defendants on notice that the declarations should include their  
 12 subsidiaries and consultants. (Brothers 3/21/06 Dec., Ex. 2.)

13 A parent corporation can be held liable for a subsidiary's infringement on a showing of  
 14 an "overlapping business relationship controlled by" the parent, or where the parent corporation  
 15 "control[s] virtually every phase of the subsidiary's operation." *Milgo Elec. Corp. v. United*  
*16 Business Communications, Inc.*, 623 F.2d 645, 660 (10th Cir. 1980); *Swift Chem. Co. v. Usamex*  
*17 Fertilizers, Inc.*, 197 U.S.P.Q. 10, 21 (E.D. La. 1977). Here, AMI admits that it has business units  
 18 spreading across corporate lines. (Smith 3/17/06 Dec., ¶ 7.) AMI's acquisition of assets that  
 19 included ASICs made by the infringing process subjected AMI to liability. *Kloster Speedsteel Ab. v.*  
*20 Stora Kopparbergs Berg Slags Ab.*, 793 F.2d 1565, 1583 (Fed. Cir. 1986) (finding liability for "a  
 21 non-party acquir[ing] assets of a Defendant-infringer"). Since Defendants admit that AMI has  
 22 created these subsidiaries based upon asset acquisitions, and because Defendants admit that "AMI  
 23 business units extend across corporate boundaries," AMI is liable for the infringing activities of its  
 24 subsidiaries.

25 Defendants are estopped from arguing that the corporate veil should shield the named  
 26 parent from liability for the infringing activity of its subsidiaries. When Ricoh sought to join  
 27 Aeroflex Colorado Springs as a party, Defendants stipulated to Ricoh and this Court that it was not  
 28

1 necessary to treat Aeroflex Colorado Springs as a separate entity because it was a subsidiary.  
 2 (Brothers 3/21/06 Dec., Ex. 6, Kelley May 3, 2004, Ltr to Meilman) (“As we have noted in previous  
 3 communications, Aeroflex Colorado Springs, Inc. is a subsidiary of Aeroflex. *It is not necessary to*  
 4 *deal with Aeroflex and its subsidiaries separately.* Aeroflex will respond on behalf of each of its  
 5 subsidiaries.”).<sup>4</sup> Defendants are now arguing the exact opposite based on nothing more than tactical  
 6 convenience.<sup>5</sup> This Court must reject Defendants argument that the infringing products of their  
 7 subsidiaries should be excluded from discovery, contrary to this Court’s orders and all of the  
 8 evidence that those ASICs were to be disclosed under threat of sanctions.

9 **B. What is the Appropriate Sanction**

10 Defendants do not dispute the authority of this Court to regulate its proceedings, and to  
 11 punish parties that have failed to comply with Court Orders. Defendants make virtually no mention  
 12 of the applicable law. Defendants only argue that the facts do not justify the imposition of the  
 13 ultimate sanction, as in *Wright v. Maritime Overseas Corp.*, 96 F.R.D. 686, 687-688 (9th Cir. 1983),  
 14 where the case was dismissed with prejudice due to plaintiff’s discovery misconduct. Here, the  
 15 corresponding ultimate sanction would be a default judgment, but Ricoh is not seeking such a  
 16 remedy. Defendants do not dispute that “[t]he choice of the appropriate discovery sanction is the  
 17 responsibility of the trial judge and will not be reversed absent abuse of discretion.” *Id.* at 687-88.  
 18 Nor do Defendants dispute that, under Rule 37(b)(2), this Court has the right to order that  
 19 “designated facts shall be taken to be established” or “prohibiting that party from introducing  
 20 designated matters in evidence.”

21

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22 <sup>4</sup> A similar attempt to “carry water on both shoulders” was rejected by the Federal Circuit in *Kloster*,  
 23 where an infringing subsidiary argued “that it cannot be bound because it was not a party, disregarding  
 24 its resistance to [plaintiff’s] motion to join it,” at the same time purchasing the parents infringing assets  
 25 in order to evade an injunction against the parent. 793 F.2d at 1583.

26 <sup>5</sup> The convoluted corporate structure of Matrox is another reason why Ricoh needs full, complete, and  
 27 non-evasive declarations, sworn under penalty of perjury. Without final declarations that take each  
 28 Defendant’s complete corporate structure into account, Defendants are given an incentive to hide  
 infringing ASICs in non-party subsidiaries, even when the Defendant parent exercises complete control  
 over those subsidiaries.

1       This is exactly the remedy sought by Ricoh. Ricoh does not seek more time for  
 2 discovery, or an extension of the trial date, because those remedies only would reward Defendants  
 3 and Synopsys for their wrongful conduct. Defendants' non-compliance with Judge Jenkins'  
 4 instructions have had an enormous consequence upon Ricoh's pretrial preparations. Defendants  
 5 were obligated to fully disclose all of the ASICs in August 2005, to promptly produce all of the  
 6 relevant documents, and to engage in timely discovery in order to enable this case to be timely  
 7 prepared for trial. They have failed to do so. Granting Defendants' request either to exclude the  
 8 undisclosed ASICs from the case, or to extend discovery for months and again delay trial, only  
 9 rewards Defendants for their disobedience.

10       As set forth in Ricoh's moving papers, the appropriate remedy for Defendants' conduct is  
 11 threefold: updated declarations from a senior corporate officer for each Defendant, evidentiary  
 12 preclusions with respect to those undisclosed ASICs, and immediate financial discovery. Monetary  
 13 sanctions, including an award of Ricoh's attorneys' fees and costs, may also be appropriate.

15       Dated: March 21, 2006

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